Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1301

~~STATE OF~~ LOUISIANA,

Petitioner,

versus

JOHN ERNEST BIRABENT,

Respondent.

Petition for Writ of Certiorari to the
Supreme Court of the State of Louisiana

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STATE OF LOUISIANA,
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Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana

---

The State of Louisiana requests that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Louisiana entered in the above entitled case December 2, 1974, rehearing denied January 17, 1975.

OPINIONS BELOW

The opinions and judgments of the Louisiana State Supreme Court appear at Appendices A and B. The opinion of the District Court, not reputed, is set forth in Appendix C.

JURISDICTION

The judgment of the District Court of the State of Louisiana was entered October 3, 1973. The judgment of the Supreme Court of the State of Louisiana was entered December 2, 1974. A timely petition for rehearing was denied on January 17, 1975, and is final by its terms. As a result of the judgment of the Louisiana State Supreme Court, the adjudication of this matter in the Louisiana Courts is final, and no further review of the merits of the Federal claims made a part of this petition is available in any Louisiana Court.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Does the holding of this Honorable Court in *Illinois v. Sommerville*, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425, prohibit Louisiana and the other states from employing substantive and procedural law so as to bar retrial of a defendant after declaration of a mistrial as a result of an unconstitutional Grand Jury indictment?

2. When a short-form indictment is employed, and it fails to name the same crime as is named in the Bill of Particulars: if standing alone it fails to provide the defendant with notice of the nature and cause of the accused crime, may the trial judge declare a mistrial without incurring a bar to retrail of the defendant?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions are set forth in Appendix D. They are:

1. United States Constitution V and VI Amendments.

2. Louisiana Code of Criminal Procedure Articles 484, 465.

3. Louisiana Criminal Code, Title 14, Sections 30 and 31.

4. Louisiana Statutes Annotated, Constitution Article I, Section 10.

STATEMENT OF THE CASE

On a bill of indictment presented by the district attorney for the Parish of St. Bernard to a Grand Jury, respondent was accused of first degree murder, in violation of LSA-R.S. 14:30.

The Grand Jury returned a true bill May 22, 1972, read in open Court as follows:

> * * * State of Louisiana versus John Ernest Birabent, Indictment for Murder, a true bill, signed Harry M. Fisher, Foreman of the Grand Jury of St. Bernard Parish, 22nd day of May, 1972. (Appendix B, p. 9a)

The portion of the indictment captioned above was what appeared on the face of the true bill, referred to hereafter as the endorsement. All twelve jurors were present and heard the charge read, "Indictment for Murder," and a statement was made by the jury foreman that at least nine Grand Jurors concurred in finding a true bill.

Ostensibly, at this time neither the judge, grand jurors, prosecutor, or defense counsel was cognizant of the discrepancy between the charge read aloud, and the pertinent body of the true bill which, while not read in open Court, said:

> * * * That one John Ernest Birabent (address) late of the Parish of St. Bernard, on or about the 7th day of May in the year of Our Lord, one thousand, nine hundred seventy-two with force of arms in the said Parish aforesaid, and within the jurisdiction of the Twenty-fifth District Court for the Parish of St. Bernard, *unlawfully killed Thomas Sciortino* . . . (Emphasis added.) (Appendix B, p. 9a)

At arraignment, May 29, 1972, the defendant was charged as follows:

> * * * John Ernest Birabent, on or about the seventh day of May, 1972, unlawfully killed one Thomas Sciortino . . .

and he entered a plea of not guilty (Appendix B, p. 9a). Defendant was later served with a copy of the indictment.

Approximately six months later, defendant requested particulars wherein he made specific reference to the murder statute and requested information about which paragraph or subsection he was charged with having violated. The state answered that he was charged under LSA-R.S. 14:30 (1) which states:

> * * * Murder is the killing of a human being: (1) When the offender has a specific intent to kill or to inflict great bodily harm.

On February 7, 1973 defendant filed a motion for disclosure of alleged similar offenses and conceded that he was charged "with the crime of murder as defined by R.S. 14:30 . . ." (Appendix A, p. 2a.)

When trial began, the entire indictment was read aloud in open Court, and, in compliance with instructions from the trial judge, the clerk read the following:

> * * * John Ernest Birabent was indicted for murder on May 29th, 1972 and the defendant was arraigned and plead not guilty . . . . (Appendix B, p. 11a)

It was not until after defense counsel had concluded his opening statement and the first State witness had been called and questioned that defense counsel pointed out to the Court that the bill of indictment charged the crime of manslaughter and not the crime of murder.

The State argued that if a defect did exist in the indictment, then the judge should permit its amendment

to cure the defect, or, alternatively, that a mistrial should be granted.

The judge denied amendment and granted a mistrial, giving the reasons for this action that the jury had been informed that the trial was for murder. Secondly, he stated that the conflict between the endorsement, which charged murder, and the charging portion of the indictment which charged manslaughter was a defect going to the substance of the charge. Defense counsel objected and reserved a bill of exceptions.

Subsequently, the State filed a motion November 27, 1973 to amend the indictment and to correct it to make it a charge of murder.

Defense counsel objected once more, and applied to the Louisiana Supreme Court for Writs of Certiorari, prohibition and mandamus. The application was denied and the defendant was told he had adequate remedy in the trial court.

When the proceedings resumed in the trial court, defense counsel filed a motion to quash the amended indictment prior to rearraignment, alleging that jeopardy had commenced at the original indictment after the first witness was sworn and had testified. The motion to quash was denied, after which the defense objected to the ruling, and reserved a bill.

Application to the Louisiana Supreme Court to review the ruling was granted and the Court held that the trial judge had declared an illegal mistrial, and that double jeopardy prevented retrial. The Court's

reasons for finding that the mistrial was illegal were that the indictment was a valid manslaughter indictment and that the endorsement did not constitute any portion of the indictment.

The State made a timely petition for rehearing, which was denied January 17, 1975.

REASONS FOR GRANTING THE WRIT

The Louisiana Supreme Court has not followed the holdings of this Honorable Court as to the right of a trial judge to declare a mistrial and not bar retrial under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. In *Illinois v. Sommerville*, 93 S.Ct. 1066, 410 U.S. 458, 35 L.Ed. 2d 425, this Court held:

> * * * A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial.

Sommerville, supra, further held that when reasons exist to declare a mistrial, which are deemed compelling by the trial judge, the mistrial may be declared without the defendant's consent and even over his objection, and the defendant may be retried notwithstanding the Fifth Amendment. *Illinois v. Sommerville*, supra, 93 S.Ct. 1068, citing *Gori v. United States*, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed. 2d 901 (1961).

In assessing the circumstances of the trial below, the Louisiana Supreme Court failed to acknowledge that a fatal substantive defect existed in the trial bill of indictment as it was written by the grand jury, and explained in the Bill of Particulars by the St. Bernard District Attorney.

The defect of the Bill of Indictment is glaring in that it does not meet the requirements of the Sixth Amendment to the Constitution of the United States, held applicable to the states in *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923. The Sixth Amendment provides that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the offense for which he is indicted. *Illinois v. Sommerville*, 410 U.S. 458, 93 S.Ct. 1066.

Russell v. United States addressed the question of what protections an indictment is intended to guarantee by providing criteria to test the sufficiency of an indictment, stating that:

> * * * These criteria are, first, whether the indictment "contains the elements of the offense contended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet," and, secondly . . . "whether the record shows with accuracy to what extent he may plead for acquittal or conviction."

Russell v. United States, 82 S.Ct. 1038, 1047, 369 U.S. 749.

Louisiana does not disparage such rights, as indicated by the Louisiana Constitution, which states:

> * * * In all criminal prosecutions, the accused shall be informed of the nature and cause of the accusation against him . . .

L.S.A. Constitution Article I, Section 10, pertinent portion.

In order that the defendant may be properly informed of the nature and cause of the charged offense, Louisiana employs the short-form indictment procedure, coupled with the guaranteed right of the defendant to be informed of the essential facts constituting the offense with which he is charged. *State v. Clark*, 288 So.2d 612, 616 (La. 1974); *State v. Wright*, 225 So.2d 201 (La. 1969). Furthermore, the Louisiana Supreme Court affords special care to this right when *the offense may be committed in a number of different ways*. *State v. Mann*, 202 So.2d 259, 262 (La. 1967). The defendant's right to a Bill of Particulars is set forth in La. C.Cr.P. Art. 484. (See Appendix D). *State v. Mann*, supra, is especially germane to the instant case, since "unlawful killing" is very non-descript.

In the instant case, the grand jury employed a short-form for manslaughter when they constructed the body of the indictment. La. C.Cr.P. Art. 465 authorizes its use, and specifies that the form for manslaughter is, "A.B. unlawfully killed C.A."

This exact short-form was attacked in *State v. Cooper*, 190 So.2d 86, for the reason that the words

"unlawfully killed," referred to no criminal homicide, failing to state the nature of the crime to be either murder, manslaughter, or negligent homicide. The Louisiana Supreme Court upheld the short-form because the endorsement on the indictment charged manslaughter. The Court reasoned that the crime of manslaughter is well known and well-defined historically and by state law. Additionally, the Court stated:

> * * * (T)he indictment makes reference to the title and section of the revised statutes (R.S. 14:31) where the definition of manslaughter may be found. *A fair reading of the whole document makes* it apparent that the accused is charged with manslaughter and not some other killing such as murder or negligent homicide. (Emphasis added.)

In the instant case, such clarification was not forthcoming by the answers contained in the Bill of Particulars. The district attorney answered the defendant's application for particulars, stating that the accused was being charged under Title 14:30 (1), the Louisiana statute defining murder, requiring specific intent to kill or inflict great bodily harm. (See Appendix D, p. 25a) This answer was provided to the defendant about January 1973. (See Appendix B, p. 10a), six months after arraignment.

It should be noted that the crime of unlawfully killing by means of murder is not a statutory crime in Louisiana. Therefore, the State contends that this answer did not specify the nature and cause of the crime

for which the defendant was indicted, because this combination of short-form indictment and answer in the Bill of Particulars does not specify a Louisiana crime. Notwithstanding this contradictory answer, the Louisiana Supreme Court held the indictment was a valid manslaughter indictment. (See Appendix A, p. 3a), stating

> * * * The indictment which formed the basis for relator's prosecution was a perfectly valid indictment for the crime of manslaughter.

In expressing this holding, the Louisiana Supreme Court stated,

> * * * The word "murder" and the alphabetical and numerical statutory designation "1950 L.R.S. 14:30" do not constitute any part of the finding of the grand jury; the endorsement is not a substantive part of the charge. See *State v. Lawrence*, 221 La. 861, 60 So.2d 464 (1952); see also *State v. DeHart*, 109 La. 570, 33 So. 605 (1903).

In reaching back to 1903, the Court ignored its holding to the contrary in *State v. Cooper*, 190 So.2d 86 (1966), discussed earlier, which held that the endorsement and the numbers contained therein did in fact save the nondescript short-form indictment for manslaughter from constitutional defectiveness. Then, as if in passing, the Court by footnote stated:

> * * * Even if the face of the indictment and the back could be read together to charge murder

> (See *State v. Cooper*, 249 La. 654, 190 So.2d 86 (1966)), the indictment would still support a verdict. The defendant would have been in jeopardy for murder. (See Appendix A, p. 6a, footnote 2.)

With all due respect to the Honorable Louisiana Supreme Court, this portion of the opinion is incredible. The Court is in effect stating that if the trial judge had allowed the defendant to be tried for what he was arraigned for, that is "unlawfully killing" the victim, (see Appendix B, p. 9a) then the indictment was a valid one for manslaughter. This being true, notwithstanding that the grand jury endorsement read in open Court stated:

> * * * State of Louisiana versus John Ernest Birabent, Indictment for Murder, a true bill . . . (See Appendix B, p. 9a)

and that the State had answered the defendant's application for particulars by stating that he was being charged under R.S. 14:30(1), the statute defining murder in Louisiana. Thus, the bill of particulars and endorsement accused the defendant of murder; the arraignment accused him of "unlawfully killing." Then, the Court adds as an addendum, that if the trial judge had decided to read the bill of indictment as a single document, then it would have been a valid murder indictment.

The Louisiana Supreme Court did not address itself to the issue of the obvious conflict between the charge named in the bill of particulars — murder — and the

charge contained in the body of the true bill of indictment — manslaughter. The vice in failing to acknowledge the absolute necessity that the bill of particulars name the elements of the same crime that the defendant is charged with in the short-form indictment, is that without the sameness the bill of particulars fails in its purpose. In failing to relate to the exact same crime, the defendant is not instructed as to what specific or general intent to commit the crime must be proven by the State, and his ability to prepare a defense is greatly impaired.

In Louisiana, first degree murder requires a specific intent to kill or to do great bodily harm, while the crime of manslaughter does not require this specific intent. (La. Cr. Code Title 14:30; 14:31.)

Thus, the Louisiana Supreme Court's decision contravenes the Sixth Amendment, and the holdings of this Court in *Russell v. United States*, 82 S.Ct. 1038, 369 U.S. 749; *United States v. Simmons*, 96 U.S. 360, 362 L.Ed. 819.

This principle was eloquently set forth in *United States v. Cruikshank*, 92 U.S. 542, 558, which stated:

> * * * The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause, and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient

in law to support a conviction, if one should be had. *For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.* (Emphasis added.)

The Louisiana Supreme Court's decision is incorrect because it holds that an indictment which reads:

> * * * That one John Ernest Birabent (address) late of the Parish of St. Bernard, on or about the 7th day of May in the year of Our Lord, one thousand nine hundred seventy-two with force of arms in the said Parish aforesaid, and within the jurisdiction of the Twenty-fifth District Court, for the Parish of St. Bernard, unlawfully killed Thomas Sciortino . . ., (Emphasis added.) (See Appendix B, p. 9a)

standing alone, satisfies the constitutional requirements of the Sixth Amendment. The indictment fails to withstand constitutional attack because it fails to state the nature and cause of the crime.

Therefore, the trial judge rightfully exercised his discretion in declaring a mistrial because he felt the indictment contained a defect going to the very substance of the charge. (See Appendix B, p. 13a)

The Louisiana Supreme Court ruled incorrectly when it stated that the trial judge committed error in

declaring a mistrial. The ruling was contrary to the United States Supreme Court's rulings in *United States v. Percy*, 9 Wheat 579 (1824); *Gori v. United States*, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961); and *Illinois v. Sommerville*, 93 S.Ct. 1066, 410 U.S. 458, 35 L.Ed.2d 425.

Sommerville, supra, explained under what conditions a trial judge may declare a mistrial, holding:

> * * * A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. 93 S.Ct. 1066, 1070.

Sommerville, supra, held that when substantive state law provides that an indictment is defective, and procedural state law disallows correction of the defect by amendment, then the trial judge may declare a mistrial. In *Sommerville*, the defect pertained to failure to specify criminal intent.

In the instant case, Title 14, Section 30 and 31 of the La. Cr. Code require that intent be specified as part of the crimes of manslaughter and murder. Thus, a failure to so specify in the short-form indictment, coupled with the bill of particulars renders the indictment defective. La. C.Cr.P. Art. 487, Section B states in part, "After the trial begins, a mistrial shall be ordered on the ground of a defect of substance." (See Appendix A, p. 5a, footnote no. 1.)

The trial judge realized that the short-form indictment which was used to indict the defendant did not mention intent as an element of the crime. He further realized that the bill of particulars referred to murder with specific intent which is not an element of the crime of "unlawfully killing" as it is known to Louisiana, this crime being known as the crime of manslaughter.

Therefore, rather than risking a sure reversal on appeal, the trial judge stopped the trial so that the defendant could be properly indicted.

Such a proper indictment would specify the elements of the crime of manslaughter, with reference to being committed in "sudden passion or heat of blood," or in some other circumstance prescribed by La. Cr. Code Title 14:31 manslaughter. (See Appendix D p. 25a)

Accordingly, we respectfully submit that it was of manifest necessity that the trial judge declare a mistrial and that the decision of the Supreme Court of Louisiana should therefore be reversed.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana

BARBARA RUTLEDGE
Assistant Attorney General
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Dated
Gretna, Louisiana
April ___, 1975

LEANDER H. PEREZ, JR.
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CERTIFICATE OF SERVICE

I, ABBOTT J. REEVES, ESQ., a member of the Bar of the Supreme Court of the United States, hereby certify that three true copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana were served on Respondent by mailing copies thereof in duly addressed envelope to Messrs. F. Irvin Dymond and William L. Crull, III, 1228 First National Bank of Commerce Bldg., New Orleans, Louisiana, this ___ day of April, 1975.

ABBOTT J. REEVES

APPENDIX

APPENDIX A

SUPREME COURT OF LOUISIANA

No. 54,733

STATE OF LOUISIANA

versus

JOHN ERNEST BIRABENT

On Writ of Review to the Twenty-Fifth Judicial District Court, Parish of St. Bernard, Honorable August A. Nobile, Judge.

BARHAM, Justice.

On May 22, 1972, the grand jury of St. Bernard Parish returned an indictment charging that relator "* * * unlawfully killed Thomas Sciortino * * *." This language contained in the indictment conforms exactly to the formula set forth in La. C.Cr.P. art. 465 for charging manslaughter in a short-form indictment. However, the typed endorsement of the name of the offense on the back of the indictment form read "MURDER" and there appeared the notation, "A True Bill" and the signature of the grand jury foreman in writing below.

On October 3, 1973, after the first witness who was sworn at the trial on the merits had testified, counsel for relator moved that the court restrict the reception of evidence to matters pertaining to the crime of manslaughter. The basis for this motion was relator's

position that the indictment charged only the crime of manslaughter, not the crime of murder. The trial court noted its agreement with the premise of relator's motion. Thereafter, the State requested that the court allow the amendment of the indictment to cure what it contended was a defect therein or, alternatively, that the court grant a mistrial. The court denied the State's request to amend the indictment to conform to a murder charge but granted the State's motion for a mistrial, giving as its reason therefor its opinion that the jury's prior knowledge of the murder charge against relator would prejudice him and deny him a fair trial on the manslaughter indictment. In addition, the court expressed its opinion that there existed in the indictment "* * * a defect that goes to the very substance of the charge." Relator objected to the granting of the mistrial and reserved a bill of exceptions when the trial court overruled the objection.

On November 27, 1973, the State filed a motion seeking correction of the indictment to make it conform to the charge of murder. A hearing on the motion was held on December 11, 1973, wherein the State presented, over defense objection, the testimony of the foreman of the grand jury which had returned the indictment. The foreman testified that the grand jury had voted to indict relator for murder. At the conclusion of the hearing, the trial court allowed the correction sought by the State and set a date for arraignment on the corrected indictment. Relator's counsel objected, reserved a bill of exceptions and gave the trial court notice of intention to apply to this Court for writs of certiorari, prohibition and mandamus. The application to this Court was denied for the reason that relator

had an adequate remedy in the trial court if error was committed. State v. Birabent, 288 So.2d 641 (La. 1974).

On February 6, 1974, relator filed a motion to quash the amended indictment, alleging that jeopardy had commenced on the original indictment on October 3, 1973, after the first witness was sworn at the trial on the merits begun at that time. Relator alleged that the trial court was without authority to grant the mistrial it had earlier declared on the basis of a defect of substance in the indictment because the indictment was a valid indictment for the crime of manslaughter. Therefore, relator contended that a prosecution based upon the corrected indictment would constitute double jeopardy. When the trial court denied relator's motion to quash, relator objected, reserved a bill of exceptions and applied to this Court for writs. We granted writs on April 30, 1974. State v. Birabent, 293 So.2d 192 (La. 1974).

La. C.Cr. P. art. 591 provides:

> "*No person shall be twice put in jeopardy of life or liberty for the same offense, except,* when on his own motion, a new trial has been granted or judgment has been arrested, or *where there has been a mistrial legally ordered under the provisions of Article 775* or ordered with the express consent of the defendant. (Emphasis here and elsewhere supplied).

Therefore, if the trial court legally ordered a mistrial under the provisions of La. C.Cr.P. art. 775, the prin-

ciples of double jeopardy will not operate in relator's favor. La. C.Cr.P. art. 775 provides:

> "A mistrial may be ordered, and in a jury case the jury dismissed, when:
>
> (1) The defendant consents thereto;
>
> (2) The jury is unable to agree upon a verdict;
>
> (3) *There is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law;*
>
> (4) The court finds that the defendant does not have the mental capacity to proceed;
>
> (5) It is physically impossible to proceed with the trial in conformity with law; or
>
> (6) False statements of a juror on voir dire prevent a fair trial.
>
> Upon motion of a defendant, a mistrial shall be ordered, and in a jury case the jury dismissed, when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by Article 770 or 771.
>
> A mistrial shall be ordered, and in a jury case the jury dismissed when the state and the defendant jointly move for a mistrial."

It is the State's contention that the mistrial granted by the trial judge was legally declared under Article 775(3) in that there existed "* * * a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law. * * *" The State contends that this "legal defect" existed by virtue of the fact that the court and counsel for the state and for relator treated the case as one for murder until the first witness had testified. The State argues that if the court had proceeded with the trial as one for manslaughter, any judgment entered upon a verdict would have been rendered reversible as a matter of law. Additionally the State contends that the indictment contained a defect of substance which warranted the declaration of a mistrial under La. C.Cr.P. art. 487.[1]

---

1 La. C.Cr.P. art. 487 provides:

"A. An indictment that charges an offense in accordance with the provisions of this Title shall not be invalid or insufficient because of any defect or imperfection in, or omission of, any matter of form only, or because of any miswriting, misspelling, or improper English, or because of the use of any sign, symbol, figure, or abbreviation, or because any similar defect, imperfection, omission, or uncertainty exists therein. The court may at any time cause the indictment to be amended in respect to any such formal defect, imperfection, omission, or uncertainty.

"Before the trial begins the court may order an indictment amended with respect to a defect of substance. After the trial begins a mistrial shall be ordered on the ground of a defect of substance.

"B. Nothing contained herein shall be construed to prohibit the defendant from entering a plea of guilty to a crime nonresponsive to the original indictment when such a plea is acceptable to the district attorney, and in such case, the district attorney shall not be required to file a new indictment to charge the crime to which the plea is offered."

We acknowledge that a substantial defect in the indictment would be grounds under La. C.Cr.P. art 775(3) for the declaration of a mistrial. Such a defect in the indictment would constitute "a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law." See Official Revision Comment (g) to La. C.Cr.P. art. 775. Therefore the central issue for our determination is whether the indictment which formed the basis for relator's prosecution contained a substantial defect.

There did not exist in this prosecution a legal defect which would render any judgment entered upon a verdict reversible as a matter of law. The indictment which formed the basis for the relator's prosecution was a perfectly valid indictment for the crime of manslaughter. The word "MURDER" and the alphabetical and numerical statutory designation "1950 L.R.S. 14:30" do not constitute any part of the finding of the grand jury; the endorsement is not a substantive part of the charge.[2] See State v. Lawrence, 221 La. 861, 60 So.2d 464 (1952); see also State v. DeHart, 109 La. 570, 33 So. 605 (1903). Nothing which took place during the proceedings would have vitiated a judgment entered upon a verdict rendered at the close of trial.

Because there did not exist legally sufficient grounds under La. C.Cr.P. arts. 775 or 487 for the

2 Even if the face of the indictment and the back could be read together to charge murder (see State v. Cooper, 249 La. 654, 190 So.2d 86 (1966), the indictment would still support a verdict. The defendant would have been in jeopardy for murder. Errors in court rulings are not attributable to defendant. A court order of a mistrial under the indictment (if read as a murder indictment) without a motion by defendant constitutes double jeopardy.

declaration of a mistrial, we hold that the trial court's action in granting a mistrial constituted an illegal dismissal of the prosecution against the relator and renders applicable our constitutional and statutory prohibitions against double jeopardy. La. Const. Art. I, §9 and La. Code of Criminal Procedure art. 591.

For the reasons assigned, we hold that the trial court erred in denying relator's motion to quash. We therefore reverse that ruling and grant relator's motion.

SANDERS, C. J., dissents for the reasons assigned by Mr. Justice Summers.

SUMMERS, J., dissents for the reasons assigned.

MARCUS, J., dissents for reasons assigned by Justice Summers.

APPENDIX B

SUPREME COURT OF LOUISIANA

No. 54,733

STATE OF LOUISIANA

versus

JOHN ERNEST BIRABENT

SUMMERS, Justice (dissenting).

At the time of the commission of the offense involved here, the murder stature provided:

> "Murder is the killing of a human being,
>
> (1) When the offender has a specific intent to kill or to inflict great bodily harm; or
>
> (2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated rape, armed robbery, or simple robbery, even though he has no intent to kill.
>
> Whoever commits the crime of murder shall be punished by death." La. R.S. 14:30

The grand jury of St. Bernard Parish returned an indictment on May 22, 1972 against John Ernest Birabent. The indictment was read aloud in open court by the clerk of court in these words:

> "State of Louisiana versus John Ernest Birabent, Indictment for Murder, A True Bill, signed Harry M. Fisher, Foreman of the Grand Jury of St. Bernard Parish, 22nd day of May, 1972."

The portion of the indictment read aloud in court appeared on the endorsement. The pertinent charging portion of the indictment appearing on the face of the document reads:

> "That one JOHN ERNEST BIRABENT (address) late of the Parish of St. Bernard, on or about the 7th day of May in the Year of Our Lord, one thousand, nine hundred seventy-two with force of arms in the said Parish aforesaid, and within the jurisdiction of the Twenty-fifth District Court, for the Parish of St. Bernard, *unlawfully killed Thomas Sciortino* . . . ." (emphasis added.)

Thereafter, while represented by retained counsel, Birabent was arraigned on May 29, 1972 on the charge read to him by the clerk in these words: "John Ernest Birabent, on or about the seventh day of May, 1972, unlawfully killed one Thomas Sciortino. How do you plead?" Whereupon he entered a plea of not guilty and asked for fifteen days in which to file special pleadings. Defendant later received service of a copy of the indictment.

Then on June 12, 1972 defendant Birabent filed a motion for a preliminary hearing, a motion to divulge evidence, an application for a bill of particulars and a prayer for oyer. The motion for a preliminary hearing alleged that he was incarcerated in the St. Bernard parish jail by virtue of "an indictment for murder" returned by the grand jury.

Some six months later, defendant filed an application for particulars making specific reference to the murder statute and requesting information as to which paragraph or subsection he was charged with having violated. If it was the second subsection of that statute, he requested information concerning the particular felony the State contended he was engaged in perpetrating at the time of the alleged offense. The State answered that he was being charged under "14:30(1)", the statute defining murder and prescribing its penalty.

On February 7, 1973 defendant filed a motion for disclosure of alleged similar offenses wherein he conceded that he was charged "with the crime of murder as defined by R.S. 14:30 and that the District Attorney in answer to an Application for Particulars has specified that the indictment herein is based upon Subsection (1) of said R.S. 14:30." He further alleged, "That Subsection (1) of R.S. 14:30 requires specific intent to kill or to inflict great bodily harm as one of the ingredients of the crime which it prohibits."

In addition to the foregoing, a number of motions for continuance and other matters were filed by defendant prior to trial, some of which were tried and disposed of

by the trial judge. Minute entries in the case referred to the cause as an "Indictment for Murder."

Examination of jurors on voir dire on October 2, 1973 was conducted with the understanding that the trial was to be on a charge of murder. According to Article 791 of the Code of Criminal Procedure, as in capital cases, after each juror was sworn he was sequestered. If the trial were being conducted as a manslaughter prosecution, this would not have been necessary.

At the time, the decision in Furman v. Georgia 408 U.S. 238 (1972), declaring capital punishment unconstitutional had not become final. In keeping with the law then applicable to a prosecution for murder, the judge instructed the jurors that if they, in a capital case, had conscientious scruples against the infliction of capital punishment it was a cause for challenge. Such a charge would not have been relevant to a manslaughter prosecution, for that crime does not involve capital punishment.

When the trial began the entire indictment was read aloud in open court, and, in compliance with instructions from the trial judge, the clerk recited the date of defendant's plea as follows: "John Ernest Birabent, was indicted for murder on May 29th, 1972 and the Defendant was arraigned and plead not guilty . . ."

In his opening statement the State's attorney stated that defendant was "charged with the murder of one Thomas Sciortino," and "The Parish of St. Bernard has indicted him for the crime of murder." The law defining the crime of murder was explained in detail by

specific reference to the articles of the criminal code on the subject. He further stated, "It is the contention of the State that the Defendant is guilty of murder and that essentially he intended to kill or inflict great bodily harm upon the deceased." He then gave a statement of the facts upon which the State would rely to prove its case. All of the foregoing was without objection by the defense.

In his opening statement defense counsel said:

> "Let me say at the outset that there is going to be no argument whatsoever about whether or not John Birabent shot and killed Thomas Sciortino. He did shoot him. He did kill him. The whole issue in this case is going to be the question of whether he was justified in doing this . . . ."

When defense counsel concluded his opening statement, the first State witness was called and questioned at length, and photographs were introduced in evidence without objection.

At this time defense counsel pointed out to the Court that the bill of indictment charged the crime of manslaughter and not the crime of murder. He argued that the precise language of Article 465 of the Code of Criminal Procedure setting forth the short form of indictment for manslaughter had been employed in the indictment. Accordingly, he moved that the court restrict the evidence in the case thereafter to evidence appropriate to a charge of manslaughter rather than murder.

In answer the State argued that if a defect existed in the indictment, the judge could permit its amendment to cure the defect, or, alternatively, that a mistrial should be granted. The amendment of the indictment was denied, but the judge did grant a mistrial. He was of the opinion that the indictment for manslaughter could not serve as a basis for the continuation of the trial because the jury had been informed that the trial was for murder. To continue the proceedings would require that the jury be informed that the trial would thereafter be converted to a manslaughter trial. He was further of the opinion that the charging portion of the indictment followed the short form indictment for manslaughter, whereas the indorsement of the indictment plainly showed that a true bill had been returned for murder. This, he believed, was a defect going to the very substance of the charge. Defendant objected to the ruling and reserved a bill of exceptions.

A motion to amend the indictment was filed by the State on November 27, 1973 to correct it to make all elements thereof conform to the charge of murder. This was to be accomplished by deleting the words "unlawfully killed" and substituting the word "murdered" in the charging portion of the body of the indictment. The indorsement was to remain unchanged. At the hearing on this motion to amend, the foreman of the grand jury was allowed to testify for the State, over defense objection, that the jury did in fact indict the defendant for murder. His testimony was to the effect that the indorsement for murder represented a true record of the grand jury's findings. The amendment was allowed, and the defendant was cited to be rearraigned at a future date.

In the reasons given for his ruling at this time, the trial judge again restated the grounds for granting the mistrial. In part, these reasons were: "The Court granted a mistrial, but more importantly for another reason. It realized that it could not try this man for murder based on the front of the form (indictment) which listed the charge of manslaughter, yet the jury had been told this defendant was being tried for murder."

Again defense counsel objected, reserved a bill of exceptions and notified the trial judge of his intention to apply to this Court for writs of certiorari, prohibition and mandamus. The application to this Court was denied on February 1, 1974 with this statement of reasons: "We pretermit whether the trial court committed error, cf. State v. Lawrence, 221 La. 861, 60 So. 2d 464 (1952), because relator has an adequate remedy in the trial court if error was committed."

When the proceedings were resumed in the trial court, counsel for the defense filed a motion to quash the amended indictment prior to rearraignment, alleging that jeopardy had commenced on the original indictment after the first witness was sworn and testified. He alleged, moreover, that the trial judge was without authority to grant a mistrial on the basis of a defect in the substance of the indictment, the indictment being a proper and legal charge for manslaughter. It followed, therefore, according to the motion, that the attempt to arraign defendant and try him on the amended indictment would constitute double jeopardy. Amendment of the indictment was also cited as a ground for the motion to quash. The motion

to quash was denied, after which the defense objected to the ruling and reserved a bill. Application to this Court to review the ruling was granted.

The validity of the plea of double jeopardy depends upon the correctness of the trial judge's ruling granting a mistrial. That ruling was based on two grounds: First, that the indictment contained a defect of substance, and, secondly, and most importantly, the principal reason was that the State's attorney, defense counsel and the trial judge proceeded in this matter upon the basis that the defendant was charged with murder. The jury had been informed to that effect, and to alter the basis of the trial, once commenced, as requested by defense counsel, from a trial on a charge of murder to a trial on a charge of manslaughter would so confuse and confound the jury that a fair trial could not be had.

The first ground upon which the mistrial was granted was that a defect of substance in the indictment required the granting of a mistrial.

Article 776 of the Code of Criminal Procedure provides:

> "A mistrial may be ordered, and in a jury case, the jury dismissed, when:
>
> (1) The defendant consents thereto;
>
> (2) The jury is unable to agree upon a verdict;

(3) There is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law;

(4) The court finds that the defendant does not have the mental capacity to proceed;

(5) It is physically impossible to proceed with the trial in conformity with law; or

(6) False statements of a juror on voir dire prevent a fair trial.

"Upon motion of a defendant a mistrial shall be ordered, and in a jury case the jury dismissed, when prejudicial conduct in or outside the courtroom makes it impossible for defendant to obtain a fair trial, or when authorized by Article 770 or 771.

"A mistrial shall be ordered, and in a jury case the jury dismissed, when the state and the defendant jointly move for a mistrial."

The defense contention, as noted, is that the indictment properly charged manslaughter and the indorsement referring to murder formed no part thereof. On this argument, it is said, the indictment was good and sufficient, and there was no defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law. Therefore, the requirements of Article 775 (3) have not been met which

would permit a mistrial where a legal defect in the proceedings exists making any judgment entered upon a verdict reversible as a matter of law. Nor have the requirements of Article 487[1] been met which stipulate that after the trial begins a mistrial shall be ordered on the ground of a defect of substance in the indictment.

The State answers this contention as follows: An indictment is a written accusation of crime by a grand jury. "It must be concurred in by not less than nine of the grand jurors, indorsed 'a true bill', and the indorsement must be signed by the foreman." La. Code Crim. Proc. art. 383. Clearly, by this authority, the indorsement is an essential part of any indictment. It is reasonable to conclude, therefore, that to ascertain the true meaning of an indictment, the whole of the document, including the indorsement, must be considered. It is upon this rationale that the Court decided State v. Cooper, 249 La. 654, 190 So. 2d 86 (1966), and permitted reference to the indorsement to clarify the meaning of the indictment. There the Court said that a fair reading of the whole document, including the indorsement, properly informed the accused of the crime he was

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1 La. Code Crim. Proc. art. 487 provides:

"An indictment that charges an offense in accordance with the provisions of this Title shall not be invalid or insufficient because of any defect or imperfection in, or omission of, any matter of form only, or because of any miswriting, misspelling, or improper English, or because of the use of any sign, symbol, figure, or abbreviation, or because any similar defect, imperfection, omission, or uncertainty exists therein. The court may at any time cause the indictment to be amended in respect to any such formal defect, imperfection, omission, or uncertainty.

"Before the trial begins the court may order an indictment amended with respect to a defect of substance. After the trial begins a mistrial shall be ordered on the ground of a defect of substance."

charged with violating. In the Court's opinion, ". . . the indorsement of the foreman of the grand jury setting out the 'charge' for which a true bill was found is as much a part of the indictment as the remainder of the document." See also State v. Stoma, 199 La. 529, 6 So. 2d 650 (1942), and State v. Morrison, 30 La. Ann. 817 (1878).

Reading the indictment as a whole in the instant case readily reveals an irreconcilable conflict between the body of the indictment charging manslaughter in the short form (La. Code Crim. Proc. art. 465) and the indorsement showing the grand jury return to be: "Indictment for Murder 1950 L.R.S. 14:30". This irreconcilable conflict led the trial judge to the conclusion that the indictment contained a defect of substance.

The argument of the State on this issue appears to be in keeping with the spirit of the Code requiring that just determination of criminal cases be paramount to technicalities of procedure. The argument seems, further, to be in accord with a recognition of the fact that the blemish and inconvenience in the law brought about by strict construction of indictments enabled more offenders to escape by the over easy ear given to exceptions in indictments, than by their own innocence. Hale, *History of Pleas to the Crown* (1st Am. Ed. 1847). Indictments are not to be employed as vehicles for a battle of wits between the draftsman and a defense counsel who seeks to checkmate the State by reason of some inadvertent and often highly technical omission. Comments, La. Code Crim. Proc. art. 465.

But we need not rest our decision on this first ground relied upon by the trial judge to grant a mistrial. The second ground he adopted is a sound basis for that ruling. Thus, when all concerned (the judge, jury, district attorney and defense counsel) conducted the proceedings in the belief that they were involved in a murder trial; and, because of a misleading indictment, defense counsel moved after commencement of trial to convert the proceeding into a manslaughter trial, that in itself, independent of the controversy over the indictment, would so impregnate the proceedings with defects that any judgment entered upon a verdict would be reversible as a matter of law. In effect, the conduct of all those involved in the trial, the judge, the district attorney and defense counsel, in leading the jury to believe the trial was on a charge for murder when the indictment charged manslaughter, though in good faith and well-meaning, so confused the issues as to make a fair trial impossible for defendant. (La. Code Crim. Proc. Art. 775 [3]). It was, after all, at the instance of defense counsel that a motion was made to have all evidence restricted to a charge of manslaughter. The trial judge in his wisdom decided this could not be done without confusing and confounding the jury to the extent that defendant would be deprived of a fair trial.

It is apparent that our judgment today is not in keeping with the principle heretofore adopted in this Court's decisions that the law should be interpreted in such a way that reasonable and necessary mistrials will not form the basis for the application of the doctrine of double jeopardy. State v. Roberson, 255 La. 74, 72 So. 2d 265 (1954); State v. Varnado, 124 La. 711, 50 So. 661 (1909).

Louisiana's constitution guarantees that no person shall be twice put in jeopardy of life or liberty for the same offense except on his own application for a new trial or where there is a mistrial, or a motion in arrest of judgment is sustained. La. Const. Art. I, ¶ 9. The guarantee is restated in Article 591 of the Code of Criminal Procedure.[2] But jeopardy does not attach under the constitution or under Article 591 of the Code of Criminal Procedure when, in the first proceeding, as here, the indictment is not clearly stated, and, in addition, all concerned, the judge, district attorney, defense counsel and the jury, were in error as to the charge upon which the prosecution was based. To make the change from murder to manslaughter suggested by defense counsel would confound and confuse the jury and deprive defendant of a fair trial. State v. Dozier, 258 La. 323, 246 So. 2d 187 (1971).

In my opinion, the trial judge correctly ordered a mistrial.

I respectfully dissent.

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2 La. Code Crim. Proc. art. 591 provides:
"No person shall be twice put in jeopardy of life or liberty for the same offense, except, when on his own motion, a new trial has been granted or judgment has been arrested, or where there has been a mistrial legally ordered under the provisions of Article 775 or ordered with the express consent of the defendant."

APPENDIX C

TRIAL COURT DECISION

EXCERPT OF THE MINUTES OF THE TWENTY FIFTH JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF ST. BERNARD, STATE OF LOUISIANA

Wednesday, October 3, 1973

Court met this day
Section "A"

Present: August A. Nobile, Jr., Judge
Lena Nunez, Deputy Clerk
Sal Nuccio, Deputy Sheriff
John Crawford, Court Reporter

NO. 24-994
State of Louisiana
Versus
John Ernest Birabent

This matter came before the Court for Trial.

Defendant present in proper person, accompanied by counsels, Mr. I. Dymond and Mr. William Crull, III.

Hon. Leander H. Perez, Jr. and Mrs. Charles H. Livaudais counsels for the State present.

All 12 Jurors present and accounted for, and was ordered to leave the Courtroom.

Mr. Dymond counsel for defense moved that the Indictment charging the defendant is a manslaughter Indictment and not a murder Indictment. Defense fur-

ther moved that the Court restrict the evidence to be presented to that only pertaining to manslaughter.

The Court after hearing arguments sustains the objection of the defense.

State moves for a mis-trial, which counsel for defense objected. The Court after hearing arguments of counsel, finds there is a defect in substance of Indictment. Court cannot try defendant for murder.

Court grants motion for mis-trial, which counsel for defense objected. To which defense reserves a bill of exceptions making part thereof the arguments of counsel and ruling of the Court. State moves that defendant be remanded to the Parish Prison on charge of murder.

The Jury returned to the courtroom. Counsels for defense and State is satisfied that all jurors are present and accounted for.

Court informed the Jury that the State moved for a mis-trial, which the Court granted, and released the Jurors.

THERE BEING NO FURTHER BUSINESS, COURT ADJOURNED.

/s/ August A. Nobile, Jr.
JUDGE, SECTION "A"

Extract from the Minutes of this Court:
Clerk's Office April 4, 1975.

/s/ RANDELL E. McNEIL
Deputy Clerk

APPENDIX D

AMENDMENT V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Art. 484. Bill of particulars

A motion for a bill of particulars may be filed of right before trial or within ten days after arraignment,

whichever is earlier. After expiration of the ten-day period the court may permit the filing of such a motion until the commencement of trial. When a motion is filed, or on its own motion, the court may require the district attorney to furnish a bill of particulars setting up more specifically the nature and cause of the charge against the defendant.

Supplemental bills of particulars or a new bill may be ordered by the court at any time before the trial begins.

When a bill of particulars is furnished, it shall be filed of record and a copy of the bill given to the defendant.

Art. 465. Specific indictment forms

The following forms of charging offenses may be used, but any other forms authorized by this Title may also be used.

* * * *

Murder — A.B. murdered C.D.

Manslaughter — A.B. unlawfully killed C.D.

§ 30. Murder

Murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated rape, armed robbery, or simple robbery, even though he has no intent to kill.

Whoever commits the crime of murder shall be punished by death.

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§ 31. Manslaughter

Manslaughter is:

(1) A homicide which would be murder under subdivision (1) of Article 30 (Murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed; or

(2) A homicide committed, without any intent to cause death or great bodily harm.

(a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Article 30, or of any intentional misdemeanor directly affecting the person; or

(b) When the offender is resisting lawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under subdivision (1) of Article 30.

Whoever commits manslaughter shall be imprisoned at hard labor for not more than twenty-one years.

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§ 10. Criminal prosecutions; information as to accusation; peremptory challenges

Section 10. In all criminal prosecutions, the accused shall be informed of the nature and cause of the accusation against him; and when tried by jury shall have the right to challenge jurors peremptorily, the number of challenges to be fixed by law.